No. 92-786

FILED
DEC 3 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEBORAH A. STONE, JANET ELLEN DIETRICH, RUTH M. LOGUE, GARY F. KAUL, KAREN KAY WASS, KATHERINE L. HASELTON, NORMA J. HETRICK, WILLIAM SCHYMAN, JOSEPH PRICE, JOHN A. LA POLLA, LOUIS RECK, and SANDRA SUE SERF,

Petitioners,

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,

and

SYLVESTER J. VAUGHNS, JR., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF RESPONDENT, PRINCE GEORGE'S COUNTY BOARD OF EDUCATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly found that the United States District Court for the District of Maryland appropriately decided that the Board of Education of Prince George's County's policy with regard to the maintenance of racial guidelines in the involuntary transfer of teachers as part of its desegregation efforts is constitutional and not a violation of the Equal Protection Clause of the United States Constitution, and in further finding that the United States District Court did not abuse its discretion in declining to withdraw its supervision of such faculty assignments.

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COUNTER STATEMENT OF THE CASE AND THE FACTS

The Board of Education of Prince George's County, Maryland ("Board" hereinafter) operates a school system for over 100,000 students, in approximately 170 schools, employing more that 6,000 teachers (App. 25). On March 12, 1972, a class action desegregation action was filed against the Board by Sylvester J. Vaughns, Jr., *et al.* ("*Vaughns* Plaintiffs" hereinafter). On September 1, 1981, the *Vaughns* Plaintiffs filed a Motion to Reopen the Case to Initiate Proceedings for Further Relief; and the NAACP filed a separate action in a consolidated case. As a result of these "second generation" desegregation actions, the Court resumed its jurisdiction over the Board in September, 1983, finding that the Board had not yet achieved unitary status, and it required the Board to consider the need to achieve unitary status as quickly as possible as a factor in connection with the making of *all* decisions. *Vaughns v. Board of Education of Prince George's County*, 574 F.Supp. 1280 (D.Md. 1983) ("*Vaughns II*" hereinafter), *aff'd in part, rev'd in part*, 758 F.2d 983 (4th Cir. 1985).

The instant matter arises out of a group of teachers ("Petitioners" hereinafter) challenging the Board's policy concerning the use of racial guidelines, as a part of its overall desegregation plan, in the implementation of involuntary transfers of teachers. Involuntary transfers do not involve terminations, layoffs or reductions-in-force; nor do they result in any loss of status, salary, benefits, or seniority. An involuntary transfer is one in which a certificated employee (teacher) is transferred from one school to another when there is a reduction in staff at the

school due to a reduction in student enrollment, a reduction in the number of students selecting classes in a particular subject matter, a change in program or similar changes that independently necessitate a staff reduction (App. 40).

Teachers are assigned and transferred, throughout the school year, for any number of reasons, having nothing to do with race. New hires must be assigned, vacancies must be filled, and teachers may desire a transfer from one school to another school for any number of reasons. Moreover, state law provides that, teachers may be "administratively" transferred to fulfill educational needs as determined by the Superintendent of Schools (App. 25).

Involuntary transfers are perhaps an unfortunate fact of life in a school system with limited financial resources, and an ever changing pupil population. As pupil population and the popularity of certain courses in given schools change, a school system may either maintain the staffing level at considerable cost, or readjust so that teachers are reassigned from schools where they are not needed to schools where they are needed. This is particularly true in a school system such as that in Prince George's County, which has experienced major changes due to school closings, the creation of magnet schools, and a declining enrollment, which all occurred without a major reduction-in-force since 1982 (App. 40, n.20).

Obviously, economics and educational need dictate the need for such readjustments. In the Spring of the school year, in preparation for the re-opening of schools in the Fall, it is necessary to evaluate staffing at each of the schools in Prince George's County, and where there is a projected reduction in student en-

rollment, a reduction in the number of students selecting classes in a particular subject, a change in programs at the school, or similar changes that necessitate staff reductions, the process of involuntary transfers is used to reduce staff at schools which will appear to need fewer teachers in the Fall than are currently assigned in the Spring, and to reassign them as needed (App. 40-44).

In order to facilitate an orderly and agreeable process in making such involuntary transfers, a procedure has been developed, and is part of the Negotiated Agreement between the Board and the Prince George's County Educators' Association ("PGCEA"), the collective bargaining representative for teachers employed by the Board (App. 41).

Although seniority is one factor used to identify the individual to be transferred, the Negotiated Agreement recognizes, however, the need for considerations other than simply seniority to be utilized in effectuating involuntary transfers:

> The Board and PGCEA recognize that valid educational principles compel the staffing of each public school to be predicated upon such considerations as school enrollment factors and ratios related to race and/or sex of its professional personnel and to that extent involuntary transfers may need to be effected from time to time in order that the Board may conform to such guidelines or criteria of employment as the approved County Board of Education Staffing Formulas or as required by appropriate State and/or Federal Authorities.

(App. 41).

Although the Petitioners, in their Statement of Facts, cover the history of the Board's teacher assignment policy, they mischaracterize the Court's findings in *Vaughns II* with respect to faculty assignments. In the instant case, the District Court noted that in 1983 it understood:

> . . . that faculty assignments were made pursuant [to the guidelines] and the corollary assignment and seniority override procedures and that, in doing so, the Board was acting in good faith under its continuing affirmative duty to pursue a unitary school system . . .

(App. 58-59).

The Court further noted that had the Board defaulted on its responsibility regarding continuing its faculty assignment policy,

> . . . and failed to ensure that its faculty assignment practices did not thwart attainment of that goal [of unitary status], this Court would have been obligated to issue an appropriate order requiring curative action by the Board.

(App. 59).

Most importantly, the Court suggested that had the Board attempted to rescind its then current faculty assignment policy, "this Court would have been empowered to order the Board to reinstate an acceptable faculty assignment plan" (App. 59-60).

Thus, the District Court has made it clear that its intent, design and understanding in 1983 when

Vaughns II was decided, was that the faculty assignment plan be continued in Prince George's County, as part of the school system's ongoing affirmative responsibility and obligation to attain unitary status.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS OF APPEALS.

The Petitioners first suggest that this case presents important and recurrent Constitutional issues over which a split exists among the Circuit Courts of Appeals. Quite remarkably, and very significantly, the Petitioners totally fail to acknowledge what this Honorable Court said in the recently decided case of *Freeman v. Pitts*, ___ U.S. ___, 112 S. Ct. 1430 (1992). The particular issue in that case concerned whether a United States District Court supervising a school system in a desegregation case must retain full remedial authority over that school system until it achieves unitary status in all six so-called *Green*[1] factors at the same time for several years. This Court, in *Freeman*, held that Federal Courts supervising desegregation plans "have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." *Id.*, 112 S. Ct. at 1445.

Significantly for the instant case, and the basis upon which the United States Court of Appeals for the

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[1] *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968). Those six factors are: student assignments, transportation, physical facilities, extracurricular activities, faculty assignments, and resource allocation.

Fourth Circuit based its decision, this Court clearly and specifically recognized:

> Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well. We have observed, for example, that student segregation and faculty segregation are often related problems. . . . As a consequence, a continuing violation of one area may need to be addressed by remedies in another.

Id., 112 S. Ct. at 1449 (Citations omitted).

This Court then cited *Bradley v. Richmond School Bd.*, 382 U.S. 103, 105 (1965) (*per curiam*), and, most importantly, it cited the District Court's opinion below in this case, for the proposition that "the components of a school desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge upon the success or failure of another." *Id.* (*See* App. 60).

Indeed, the District Court in this case found, as matters of fact, and the Court of Appeals found such findings not clearly erroneous (App. 6-7), that "the avoidance of racially identifiable faculties is critical to a desegregation plan like that of Prince George's County which relies heavily on magnet schools" (App. 62); that the success of such magnet programs largely depends upon parental choices, which may, in turn, be shaped by perceptions of the characteristics of faculty; that "[c]urtailing the Board's power with respect to faculty assignments might result in consequences beyond the resegregation of faculties and could well

threaten the success of the overall school desegregation program" (App. 62); and finally, that if the Board was barred from taking measures in the realm of faculty assignments, the sole option available to the Board for attaining the goal of unitary status, would be that of altering student assignment policies, a "drastic limitation" which may well "doom the Board's pursuit of unitary status to failure." (App. 62).

The Petitioners' suggestion that a split exists among the Circuit Courts of Appeals is simply erroneous. There is no such split. The Petitioners suggest that the Fourth Circuit's decision in the instant case departs from a line of Fifth Circuit cases[2] holding that teachers in any school system or at any particular school need not be indefinitely maintained at any arbitrary racial ratio. However, the decision in this case does not depart from the holding in those cases. The issue here is not whether or not the Prince George's County School System has achieved unitary status, and therefore, there is likewise no issue as to what test should be applied in determining the existence of unitary status. None of the Fifth Circuit decisions cited by the Petitioners involved, as here, Constitutional challenges to a faculty assignment plan instituted as a part of an overall desegregation plan in a *non-unitary* school system. As noted by the District Court, below, "careful reading" of this line of decisions suggests that the Appellate Courts never in-

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[2] *United States v. Wilcox County Bd. of Educ.* 494 F.2d 575 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *Fort Bend Independent School Dist. v. City of Stafford*, 651 F.2d 1133 (5th Cir. 1981); *Quarles v. Oxford Municipal Separate School Dist.*, 868 F.2d 750 (5th Cir. 1989).

tended to deprive a District Court or school board "the use of faculty assignments to achieve unitariness in the school system itself." (App. 62).

In at least four Circuits other than the Fourth Circuit, Courts have upheld school systems' use of faculty assignment guidelines as desegregation remedies: *Zaslawsky v. Board of Educ.*, 610 F.2d 661 (9th Cir. 1979); *Caulfield v. Board of Educ.*, 632 F.2d 999 (2nd Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Kromnick v. School Dist.*, 739 F.2d 894 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); and *Jacobson v. Cincinnatti Bd. of Educ.*, 961 F.2d 100 (6th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3248 (October 5, 1992). In *Jacobson*, the Court simply found that the policy was implemented to achieve "a racially integrated faculty" throughout the school system, and the policy was upheld on that basis. *Id.*, at 103. In *Zaslawsky*, the Court noted that "faculty assignment plays an important part in the overall plans to eliminate dual or segregated school systems." *Id.*, at 663.

The Petitioners' further suggestion that the case of *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987) presents a split over the issue of whether non-unitariness in student assignment may justify remedies in faculty assignment is equally erroneous in light of the clear language of *Freeman v. Pitts*, *supra*, as cited hereinabove. Whatever question may have existed prior to *Freeman* regarding the question of whether a faculty desegregation plan may continue as part of an overall desegregation plan has been clearly and unequivocally answered in *Freeman*, and there is no need for this Court to further address the question.

II. THE RULINGS BELOW ARE CONSISTENT WITH THIS COURT'S PRECEDENTS IN DESEGREGATION CASES.

It is indeed ironic that the Petitioners in this case protest as unconstitutional the use of racial guidelines in assigning teachers in Prince George's County, where students have been assigned to schools on the basis of their race since 1973. It is vital not to lose sight of the fact that the faculty assignment policy is one part of a much broader desegregation plan designed for the purpose of achieving unitary status in the Prince George's County School System. The District Court, in its discretion in overseeing and supervising the desegregation efforts of the school system, has made factual findings that the faculty assignment plan was necessary to avoid a racially identifiable faculty; that without such a plan, the overall school desegregation program might well be threatened; and the Board's pursuit of unitary status might well be doomed. (*See* App. 6 and App. 62). The Petitioners view the policy as simply an employment policy, and they fail to recognize the link between faculty assignment and student desegregation.

There can be no question about the critical importance of the racial composition of faculty assignments in schools when considering the issue of unitary status in desegregating school systems. This Court has long recognized the significance and importance of faculty and staff desegregation as part of an overall school desegregation plan. In *Green v. New Kent County School Bd.*, 391 U.S. 430, 435 (1968), this Court noted that existing policy and practice with regard to faculty and staff were among the most important indications of a segregated school system. In *Swann v.*

Charlotte–Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971), the Court noted:

> Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, . . . a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

This Court made a very important distinction between matters of transportation, supporting personnel, and extracurricular activities on the one hand, and new school construction and faculty assignment on the other. "Something more" than "normal administrative practice" producing "schools of like quality, facilities, and staffs" was necessary in the area of construction and faculty assignments. *Id.*, at 18-19. The *Swann* Court pointed to *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971), where the Court expressly rejected the school system's arguments that teachers must be assigned on a "color blind" basis, and that the Constitution prohibits "district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation." *Swann*, at 19.

The *Swann* Opinion also referred to *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969), where the Court of Appeals modified a District Court Order regarding faculty assignment, by eliminating what it regarded as "fixed mathematical" ratios. The Court of Appeals also held that "the numerical ratio should be eliminated" in the future, and that compliance "should not be tested solely by

the achievement of specified proportions." This Court reversed the Court of Appeals and restored the District Court's order. In *Montgomery County*, the Court recognized the goal of desegregating faculty and staff to be "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *Id.*, at 232.

In *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536, n.9 (1979), the Court again noted the "relevance of segregated faculty assignments as one of the factors in proving the existence of a school system that is dual for teachers and students. . . ."

In addition to avoiding the racial identifiability of schools by their faculty, there are sound educational reasons for educating students with an integrated, rather than a segregated faculty. As Justice Stevens noted in his concurring opinion in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 512, n.2 (1989) (Stevens, J., concurring):

> . . . one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.

The Petitioners' characterizing the Board's policy as one which applies the rigid use of racial ratios

solely for the purpose of maintaining racial balance is incorrect and inappropriate. The policy does not use "rigid racial ratios," nor is it done "solely for the purpose of maintaining racial balance."

The District Court found, and the Court of Appeals affirmed, that the policy was and remains a necessary part of the desegregation plan in place in Prince George's County for the purpose of supporting the school system's affirmative duty to achieve unitary status. Such findings do not depart from this Court's precedents on school desegregation—they are perfectly consistent with them.

CONCLUSION

For all of the aforegoing reasons, the Respondent, Board of Education of Prince George's County, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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